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In the Supreme Court of the United States

OCTOBER TERM, 1986

WEISSER OPTICAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether in the circumstances of this case the Board properly found that petitioner's encouragement of its employees to file a decertification petition precluded its reliance on the petition to support a good faith doubt of the certified bargaining agent's continuing majority status.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. A11-A23) are reported at 274 N.L.R.B. No. 143.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1986, and a timely petition for rehearing was denied on May 15, 1986 (Pet. App. A52). The petition for a writ of certiorari was filed on June 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's 22 optical shop and stock department employees, about 17 of whom work in Peoria (Pet. App. A2), have been represented by Local 853 of the United

Optical Workers Union for many years. In April 1983, petitioner entered into its latest collective bargaining agreement with the union, which expired in April 1984 (Pet. App. A11, A26-A27). Prior to the expiration of the contract, petitioner's owner, Philip Hirsch, asked Ken Ratcliff, an employee at petitioner's Peoria laboratory, to initiate an effort to decertify the union. Hirsch told Ratcliff that " 'we have to do something. The Union is killing me. I can't compete.' " *Id.* at A12, A27. Ratcliff suggested that Hirsch get someone else, but Hirsch replied that he wanted Ratcliff because of his rapport with the other employees (*ibid.*). During this meeting, which was also attended by laboratory director Sallie Homan, Ratcliff was given a booklet entitled "Union Decertifications," which contained detailed instructions on how companies could oust incumbent unions (*ibid.*). Attached to the booklet was a model "showing of interest" form for employees to use in preparing a decertification petition for the National Labor Relations Board (*id.* at A27).[1] That same evening, Ratcliff met with other laboratory employees to decide whether they desired to decertify the union. The assembled employees decided not to take any action to decertify the union (*id.* at A12, A27).

In early February 1984, Homan, who was then Ratcliff's immediate supervisor, told him that Hirsch had advised her that " 'it was getting close to th[at] time,' " referring to the " 'open period' " under the Board's rules when a decertification petition could be filed during the term of a collective bargaining agreement.[2] In mid-February, Homan asked

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[1]At least 30% of the employees in a bargaining unit must sign such a "showing of interest" form before the Board will direct an election to determine if a majority of the employees no longer desire to be represented by the union. See 29 C.F.R. 101.17, 101.18.

[2]The period here was February 1 to March 1, 1984 (Pet. App. A12 n.1).

Ratcliff to return the booklet on decertification he had been given the previous year. Homan also had two conversations with employee James Menees concerning Hirsch's desire to get a decertification effort started. Pet. App. A12-A13.

On February 24 Hirsch called a meeting of all the Peoria laboratory employees. Homan and controller David Lloyd were also present. Homan stated that she had received questions concerning employee benefits if the union were voted out, and Hirsch and Lloyd then discussed benefit options that might be available. Pet. App. A13, A29-A30. Hirsch concluded the meeting by telling the employees that they were mature enough to work out any differences with him without the intervention of a "third party," by which Hirsch meant the union (*id.* at A13, A30).

Shortly after the meeting concluded, Ratcliff began circulating copies of the "showing of interest" form he had made from the model in the booklet petitioner had given him. Copies of the form were also sent to unit employees at petitioner's two other laboratories and returned through the inter-office delivery system. On February 28, Ratcliff filed with the Board a decertification petition accompanied by "showing of interest" forms signed by 18 unit employees. Pet. App. A30.

The union filed unfair labor practice charges against petitioner concerning the decertification effort, and the Board subsequently issued an unfair labor practice complaint based on those charges and dismissed the decertification petition. Nevertheless, petitioner withdrew recognition from the union, claiming a good faith doubt as to the union's majority status based on the decertification petition. Thereafter, petitioner refused to bargain with and supply relevant information to the union. Pet. App. A34-A36.

2. The Board agreed with the administrative law judge that petitioner "unlawfully sponsored and encouraged the decertification effort" (Pet. App. A12). The Board found that "the idea of decertification was implanted in the employees' minds by [petitioner]" (*id.* at A14) and noted that "Homan's unsolicited remarks to Ratcliff were, in essence, a renewal of Hirsch's earlier expressed request that Ratcliff file a decertification petition" (*id.* at A13). It also noted that Homan's comments to Menees and Hirsch's statements at the February 24 meeting constituted coercive pressure on employees to engage in a decertificaton effort (*id.* at A13, A14 & n.5). The Board further found that the employee petition was tainted by petitioner's unlawful conduct, and that petitioner therefore could not rely on it in asserting a good faith doubt as to the union's majority status. Accordingly, the Board concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with and to supply information to the Union. Pet. App. A12, A14-A15.[3] The Board entered an appropriate remedial order (*id.* at A18-A20).

3. The court of appeals, by unpublished order, upheld the Board's decision and enforced its order (Pet. App. A1-A10). The court concluded that substantial evidence supported the Board's finding that petitioner violated the Act by encouraging the instigation of the decertification process. The court further agreed with the Board that petitioner's sponsorship of the decertification petition precluded reliance on it to establish a good faith doubt of the union's continuing majority status. *Id.* at A9-A10. The court stated that a "causal relation" between the unlawful employer

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[3]The Board rejected the administrative law judge's further findings that petitioner had unlawfully promised benefits to the employees and bargained with and solicited grievances from them directly (Pet. App. A15-A18).

encouragement and the actual filing of a decertification petition need not be shown to taint the petition and preclude reliance on it (*id.* at A8); rather, it need only be shown that the employer's conduct "reasonably tended" to cause the petition to be filed (*id.* at A10). However, the court also found that the Board did not err in concluding that the facts here established a causal connection between petitioner's actions and the filing of the decertification petition (*id.* at A7-A8).[4]

ARGUMENT

Petitioner does not dispute the Board's finding, upheld by the court of appeals, that it violated the Act by encouraging its employees to file a decertification petition. And petitioner acknowledges (Pet. 7) that an employer may not rely on a decertification petition as evidence of the bargaining agent's loss of majority status where the employer's unlawful conduct has tainted the petition. Petitioner contends, however, that the court of appeals erred in requiring only a showing that the employer's conduct "reasonably tended to encourage decertification" (Pet. App. A10), rather than a showing of "a demonstrable nexus between the employer's actions and employee disaffection for the union" (Pet. 7).[5]

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[4]The court of appeals denied petitioner's motion for a stay of the judgment pending the filing of the instant petition (Pet. App. A53-A54). On June 13, 1986, Justice Stevens denied petitioner's application for a stay directed to this Court.

[5]Petitioner also contends (Pet. 8-10) that the Board and the court improperly relied on Hirsch's statement that he and his employees could work out their differences without the intervention of a "third party" in finding that the decertification petition was tainted. That issue is not properly presented. Petitioner never contended before the Board that Hirsch's remarks were privileged by Section 8(c) of the Act, 29 U.S.C. 158(c), and, accordingly, that contention may not be raised here. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666

There is no need in this case to determine whether employer encouragement of a decertification petition taints the petition in the absence of a causal nexus between the encouragement and the filing of the decertification petition. The Board here found that "the idea of decertification was implanted in the employees' minds by the [petitioner]" (Pet. App. A14), and the court below agreed that the decertification petition would not have been filed without petitioner's actions (Pet. App. A8). Accordingly, even if a "demonstrable nexus" were required, such a showing has been made here, as the court of appeals recognized.

Moreover, the decision of the court below is consistent with the uniform holdings of other courts of appeals that an employer cannot rely on a decertification petition which it instigated in asserting a good faith doubt of the bargaining agent's continuing majority status. See, *e.g., NLRB* v. *Maywood Plant of Grede Plastics*, 628 F.2d 1, 6 (D.C. Cir. 1980); *NLRB* v. *Sky Wolf Sales*, 470 F.2d 827, 830 (9th Cir. 1972); see also *Texaco, Inc.* v. *NLRB*, 722 F.2d 1226, 1235-1236 (5th Cir. 1984). The Ninth Circuit's decision in *Hotel Employees Local 19* v. *NLRB*, 785 F.2d 796 (1986) (Pet. App. B1-B13), is not to the contrary. In that case, the Board, upheld by the court of appeals, rejected the assertion that the employer's previous unlawful denial of access to

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(1982). Indeed, petitioner raised the objection concerning Section 8(c) before the court of appeals only in its petition for rehearing.

In any event, there is no merit to petitioner's assertion that Hirsch's statements were statements of opinion privileged by Section 8(c). In *Indiana Cabinet Co., Inc.*, 275 N.L.R.B. No. 169 (July 25, 1985), slip op. 3-4, the Board held that an employer's accurate summary to employees of Board decertification procedures is permitted by Section 8(c). However, the Board emphasized that the employer there did not request the employees to start a decertification effort. Here, in contrast, the Board found that Hirsch's statements were "an aspect of [its] unlawful sponsorship and encouragement of the decertification petition" (Pet. App. A14 n.5).

union agents to its premises contributed to the employee disaffection that prompted the employees' effort to seek decertification (*id.* at B9-B10). The court of appeals stressed (*id.* at B12) that, in contrast to this case, the decertification effort in *Hotel Employees Local 19* originated with the employees and management was not even aware of the decertification petition until it was presented to the company.[6]

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[6]In *NLRB* v. *Nu-Southern Dyeing & Finishing, Inc.*, 444 F.2d 11, 16 (4th Cir. 1971), the court found that the employer's statement that the employees were not receiving adequate representation for the dues they were paying was "no more than a technical violation of § 8(a)(1) * * * [in light of the facts that the employer] was specific in telling the employees that the ultimate decision concerning the petition was their own and that under no circumstances was company time or property to be involved." That case, therefore, is also clearly distinguishable from this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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